



Signed and Filed: February 28, 2020

*Dennis Montali*

DENNIS MONTALI  
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA

In re: ) Bankruptcy Case  
PG&E CORPORATION, ) No. 19-30088-DM  
- and - ) Chapter 11  
PACIFIC GAS AND ELECTRIC COMPANY, ) Jointly Administered  
Debtors. )  
☐ Affects PG&E Corporation )  
☐ Affects Pacific Gas and )  
Electric Company )  
☒ Affects both Debtors )  
\* All papers shall be filed in )  
the Lead Case, No. 19-30088 (DM). )

**MEMORANDUM DECISION REGARDING (1) VLZAKIS' MOTION AS TO  
INAPPLICABILITY OF STAY, AND IN THE ALTERNATIVE FOR RELIEF FROM  
STAY (DKT. 4846) and (2) DEBTORS' MOTION TO REJECT VLZAKIS'  
CONTRACT AND GRANT RELATED RELIEF (DKT. 5272)**

I. Procedural History

On November 22, 2019, George Vlzakakis, Maria Barbis, John Barbis and Athanasia Vlzakakis (collectively, the "Vlzakakis Parties") filed a Motion as to Inapplicability of Stay, and in the Alternative for Relief from Stay ("MRS") (dkt. 4846), which

1 Pacific Gas and Electric Company ("Utility") and PG&E  
2 Corporation (collectively, "Debtors") opposed (dkt. 5089). At  
3 the initial hearing on the MRS, Debtors indicated that they  
4 intended to reject a contract relevant to the MRS. The court  
5 therefore directed Debtors to file a motion to reject the  
6 contract and a further opposition to the MRS and directed the  
7 Vlazakis Parties to file a further opposition thereafter.

8 On January 6, 2020, Debtors filed a Motion to Reject  
9 Vlazakis' Contract and Grant Related Relief and Brief in Support  
10 of Rejectability ("Motion to Reject") (dkt. 5272). The  
11 Vlazakis Parties filed an opposition on January 20, 2020 (dkt.  
12 5415) and Debtors filed a reply on January 31, 2020 (dkt. 5588).  
13 Following a hearing on February 11, 2020, the court took both  
14 the MRS and the Motion to Reject under submission. For the  
15 reasons set forth below, the court is granting the former and  
16 denying the latter.

## 17 II. Relevant Facts

18 In 2015, the Utility purchased property in Oakland adjacent  
19 to a building owned by the Vlazakis Parties. That building is  
20 supported by three I-beams which cross a strip of land owned by  
21 the Utility and are bolted to the brick wall of the Utility's  
22 building. Without these I-beams, the Vlazakis Parties' building  
23 would likely collapse, as it has no exterior or interior wall of  
24 its own along the property line shared with the Utility. Decn.  
25 of Brian Garber, dkt. 5273-2, ¶ 4.

26 The Utility intends to build a new gas regulation  
27 substation at this location to meet safety standards and code  
28 requirements "and [to] enhance the inspection of gas

1 transmission lines and the safe management of the lines in an  
2 emergency." Motion to Reject at dkt. 5272, ECF pg. 7, lines 5-  
3 7; see also Decn. of Brian Garber, dkt. 5273-2, ¶ 3. To do so,  
4 it must remove the bolted I-beams. *Id.* As a result, the  
5 Vlazakis Parties' building will have no support for its roof.  
6 *Id.* at lines 14-15.

7       Upon realizing it would need to demolish its building in  
8 order to build the substation, the Utility entered into a letter  
9 agreement with the Vlazakis Parties in November 2017 (the  
10 "Letter Agreement"). The Utility agreed to buttress its wall to  
11 which the I-beams are attached and to convey the adjacent strip  
12 of land to the Vlazakis Parties, provided that it obtained  
13 necessary regulatory permits and approvals. Decn. of Brian  
14 Garber, dkt. 5273 at ¶ 7; Letter Agreement, dkt. 5273-1 at ¶ 4.  
15 In turn, the Vlazakis Parties agreed to "cooperate in the effort  
16 to obtain City Approval and CPUC Approval, including signing any  
17 related documents that may be necessary for such approvals."  
18 Letter Agreement, dkt. 5273-1 at ¶¶ 1 and 5.

19       Paragraph 2 of the Letter Agreement described the specific  
20 work that PG&E and the Vlazakis Parties contemplated:

21               PG&E will reinforce the existing masonry wall  
22 on its property located at the Southeast corner of  
23 3<sup>rd</sup> and Market Street, which constitutes the easterly  
24 wall of the existing building and immediately  
25 adjacent to the easterly property line. PG&E shall  
26 install wall bracings to stabilize the wall. All  
27 work will conform to standards and codes of  
28 applicable engineering and local state and federal  
codes.

Dkt. 5273-2 at ECF pg. 9.

1           The Utility contends that the Vlazakis Parties did not  
2 satisfy a condition imposed by the City of Oakland for  
3 regulatory approval of the project: the Vlazakis Parties had to  
4 make their property compliant with seismic codes and ADA law.  
5 The Vlazakis Parties refused, but the City of Oakland  
6 nonetheless approved the wall-bracing aspect of the proposed  
7 project. Decn. of Brian Garber, dkt. 5273 at ¶¶ 3, 9-10; Garber  
8 Decl. Ex. A. Thus, any noncompliance by the Vlazakis Parties  
9 was immaterial for the purposes of the underlying motions.

10          After the Utility received the required approval from the  
11 City of Oakland of the wall-bracing design contemplated by  
12 paragraph 2 of the Letter Agreement, "it became clear that the  
13 design was not compatible with the Utility's gas transmission  
14 engineers' plans for the Project." Decn. of Brian Garber, dkt.  
15 5273 at ¶ 10. The Utility thus abandoned the design that was  
16 the subject of paragraph 2 of the Letter Agreement. Over the  
17 subsequent months and years, the Utility continued to work with  
18 the City of Oakland and the Vlazakis Parties and other  
19 regulatory agencies to address the encroachment and build the  
20 substation. *Id.* at ¶ 4-11.

21          After filing its chapter 11 petition on January 29, 2019,  
22 the Utility filed a state court complaint against the Vlazakis  
23 Parties, asserting causes of action for trespass and nuisance  
24 and seeking injunctive relief. The Vlazakis Parties filed an  
25 answer and sought relief to file an affirmative cross-complaint  
26 to assert a quiet title claim seeking legal and equitable rights  
27 to continued use of the wall. In particular, the Vlazakis  
28 Parties contended that the wall is a common party wall in which

1 they have an easement. See Fourteenth Affirmative Defense in  
2 Answer of George Vlazakis, appended to Decn. of Ronald F.  
3 Berestka, Esq. at dkt. 5417, ECF pg. 33.

4 Because the Utility asserted that the cross-complaint  
5 violated the automatic stay, the Vlazakis Parties filed their  
6 MRS. Debtors filed the Motion to Reject in response.

7 III. Discussion

8 In arguing that the Letter Agreement should be rejected,  
9 Debtors contend that performance is still owed by both sides to  
10 the agreement, and the Letter Agreement is thus executory. The  
11 court disagrees. An executory contract is one under which the  
12 obligations of both the debtor and the other party "are so far  
13 unperformed that the failure of either to complete performance  
14 would constitute a material breach and thus excuse the  
15 performance of the other." *In re Robert Helms Const. & Dev.*  
16 *Co.*, 139 F.3d 702, 705 (9th Cir. 1998), *citing* Vern Countryman,  
17 *Executory Contracts in Bankruptcy*, 58 Minn. L. Rev. 439, 479  
18 (1974).

19 The primary remaining performance due by the Vlazakis  
20 Parties is to provide PG&E and subcontractor "required access to  
21 parcels 011-0111-001 and 001-0111-002 for the stabilization of  
22 the masonry wall and construction of the concrete block wall;  
23 including the right to work, laydown and stage construction  
24 materials and equipment during the work." See Letter Agreement,  
25 dkt. 5273-1 at pg. 3, ¶ 8. As noted previously, however, the  
26 Utility has determined that the wall-bracing design requiring  
27 such access is not feasible. Consequently, the contemplated  
28 performance by the Vlazakis Parties has been rendered

unnecessary for the purposes for which it was contracted. PG&E's own abandonment of the planned work described in paragraph 3 of the Letter Agreement absolved the Vlazakis Parties of the corresponding obligation to provide access for the performance of such work. There is no other term in the Letter Agreement giving rise to an ongoing and outstanding obligation to perform by the Vlazakis parties. Under governing Ninth Circuit law, therefore, the Letter Agreement is not executory and thus is not subject to section 365<sup>1</sup>. See, e.g., *In re Robert L. Helms Constr. & Dev. Co.*, 139 F.3d 702, 706 (9th Cir. 1998) (en banc) (to determine whether a contract is executory, a court looks "to outstanding obligations at the time the petition for relief is filed and ask whether both sides must still perform").<sup>2</sup> Stated differently, the conduct by the Utility after its decision not to go forward on the project leads the court to conclude from the undisputed facts of this long-simmering dispute that there simply was no longer a viable executory contract for it to reject under the Bankruptcy Code.

The issues in dispute in the state court action do not involve any question of bankruptcy law. To the contrary, the Utility asserts three causes of action arising under state law: (1) Abatement of Nuisance under Civil Code § 3479 *et seq.*; (2)

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<sup>1</sup> 11 U.S.C. § 365.

<sup>2</sup> Given that the Letter Agreement is no longer executory, the court does not have to determine whether the decision to reject it satisfies the business judgment rule. *Agarwal v. Pomona Valley Med. Grp., Inc. (In re Pomona Valley Med. Grp., Inc.)*, 476 F.3d 665, 670 (9th Cir. 2007).

1 Trespass; and (3) Declaratory Relief (Removal of Encroachment).  
2 See Decn. of Ronald F. Bereska, Esq. at dkt. 5417, ECF pp. 5-  
3 13). Similarly, the claims asserted in the verified cross-  
4 complaint filed by the Vlazakis Parties are governed by  
5 California state law: (1) Quiet Title (Implied Easement by  
6 Existing Use); (2) Quiet Title (Prescriptive Easement); (3)  
7 Quiet Title (Easement by Necessity); (4) Breach of Contract;  
8 (5) Breach of Covenant of Good Faith and Fair Dealing; (6)  
9 Negligence; and (7) Declaratory Relief.

10 Even though the Utility's complaint and the Vlazakis  
11 Parties' complaint involve solely state law issues, Debtors seek  
12 to reject the Letter Agreement and thereby sever the breach of  
13 contract and breach of covenant causes of action from the  
14 balance of Vlazakis Parties' cross-claims, arguing that the  
15 addition of these cross-claims could delay the May trial date in  
16 state court (and thus the necessary construction of the new gas  
17 pipelines and gas regulation substation). Debtors assert that  
18 the breach of contract claims should be litigated through the  
19 bankruptcy court's claims allowance process. This court  
20 disagrees. Assuming that (and this court takes no position)  
21 the Letter Agreement somehow accords the Vlazakis Parties any  
22 equitable or monetary claims or defenses relating to the  
23 encroachment, the state court should resolve it under non-  
24 bankruptcy principles. This is particularly appropriate as the  
25 equitable defenses raised by the Vlazakis Parties include three  
26 claims for easement. Rejection of the Letter Agreement would  
27 not alter that outcome, as Section 365 cannot be used to reject  
28

1 restrictive covenants and easements, assuming they in fact  
2 exist.<sup>3</sup>

3 IV. Conclusion

4 For the foregoing reasons, the court will deny the Motion  
5 to Reject and grant the MRS. Counsel for the Vlazakis Parties  
6 should upload orders for each motion, and comply with B.L.R.  
7 9021-1(c) prior to uploading them.

8 **\*\*END OF MEMORANDUM\*\***

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23 <sup>3</sup> In *Gouveia v. Tazbir*, 37 F.3d 295, 298 (7th Cir. 1994), the  
24 Seventh Circuit directly addressed whether a restrictive covenant on  
25 real property was an executory contract that could be rejected in a  
26 bankruptcy case. It reasoned that, although restrictive covenants  
27 contain the characteristics of both a contract and an interest in  
28 land, the primary nature of such covenants is preservation of a land  
interest not subject to section 365 termination or rejection. *Id.* at  
298-99. In an unpublished decision, the Ninth Circuit Bankruptcy  
Appellate Panel followed and adopted the holding of *Gouveia v.*  
*Tazbir*. *In re Hayes*, 2008 WL 8444812 (9th Cir. BAP 2008).